CHAPTER 10

CONSTRUCTION

10-1. Requirements of Project Cooperation.

a. General. Prior to the initiation of construction, the non-Federal sponsor of a water resources project and the Government must enter into a binding agreement in the form of a Project Cooperation Agreement (PCA) as required by Section 221 of the Flood Control Act of 1970 (Public Law 91-611), as amended, and by Section 101(e) {Harbors} and Section 103(j) {Flood Control and Other Projects} of the Water Resources Development Act (WRDA) of 1986 (Public Law 99-662), as amended. The PCA must describe, among other things, all of the requirements and responsibilities relating to construction of the project including items of local cooperation required from the non-Federal sponsor. Local cooperation requirements typically include that the non-Federal sponsor pay a percentage share of the costs of construction. The required percentage varies depending on the project purpose (e.g., harbor navigation projects, flood control) and is generally prescribed by law (see, for example, Sections 101, 103 and 1135 of WRDA 1986, as amended). In addition, a non-Federal sponsor must also provide all lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas required for the project (except in the case of navigation projects where dredged material disposal areas are part of the general navigation features (GNF) under Section 201 of WRDA 1996) as well as perform or ensure the performance of all necessary relocations (collectively referred to as LERRD requirements; see Section 101(a) and (e), Section 103(a) and (j) of P.L. 99-662). Generally, the value of the required LERRD provided by the non-Federal sponsor will be credited against the non-Federal sponsor’s percentage share of the costs of construction. The portion of the non-Federal sponsor’s required share of costs that remains after LERRD credit is afforded must be paid to the Government in cash. If construction of the project will be completed within one fiscal year, the cash payment must be made in a lump sum prior to solicitation of the first construction contract. If construction of the project will not be completed within one fiscal year, the non-Federal sponsor must make cash payments each fiscal year in proportion to the Government's estimated financial obligations for construction in each fiscal year. (ER 1165-2-131; Chapter 12, ER 405-1-12).

b. PCA Approval. The PCA for a project is initially negotiated between representatives of the district and the non-Federal sponsor following the terms of a model PCA if one has been approved for the project purpose by ASA(CW). For structural flood control projects, District commanders have authority to execute PCAs for projects with a Federal cost of less than $50 million for PCAs which do not deviate from the flood control model. Division commanders may execute PCAs with Federal cost greater than $50 million if the model is used. Delegated authority for PCA execution with use of an approved model also applies to the continuing authorities and the Section 1135 and Section 204 programs. PCAs for other purposes without approved models must be approved by the ASA(CW).

c. Projects Specifically Authorized by Congress. n addition to the general requirement imposed by law, there may be further required items of local cooperation provided in the authorizing legislation for the projects or in any report referenced therein. Therefore, such legislation and reports must be carefully reviewed to

determine all applicable items of local cooperation for the project.

d. Projects Under Continuing Authorities. Similar to specifically authorized projects, the continuing authority project decision document or report may require additional items of local cooperation. Therefore, such legislation and document or report must be carefully examined to determine all applicable items of local cooperation for the continuing authority project.

e. Other Specific Requirements.

(1) Facilities for recreation require a 50 percent non-Federal contribution and a PCA which includes the recreation elements. Construction of the rest of the project may commence without formal local agreement for recreation, provided the benefit-cost ratio is recomputed and economic justification for the balance of the project is achieved with inclusion of minimum basic facilities provided at Federal expense.

(2) Section 77 of the Water Resources Development Act of 1974 (Public Law 93-251) amended the requirements for local participation in measures for the enhancement of fish and wildlife to provide for 75 percent Federal and 25 percent non-Federal sharing of separable first costs at projects not substantially complete on the date of enactment. However, Section 906(e)of WRDA 1986, as amended by Section 107(b) of WRDA 1992, sets forth various conditions and associated cost sharing when the Secretary of the Army recommends fish and wildlife enhancement in reports to the Congress. See paragraph 6-14.a - c.

(3) Assurances required for future water supply should be reasonable but in accordance with Section 4 of Public Law 92-222 need not be a binding contract in strict conformance with the requirements of Section 221 of the River and Harbor Act of 1970 (Public Law 91-611). However, see paragraph 18-2.a.

f. Use of Other Federal Funds. Project sponsors sometimes wish to meet their cost sharing responsibilities in connection with a Corps project not with local funds, but with funds they have received from the Federal Government. The use of Federal funds by non-Federal sponsors to satisfy any part of the non-Federal cost share is prohibited, in principle, because such use of Federal funds is not generally authorized. District commanders should carefully examine the sources of local project funding. The Corps can accept the use of Federal funds by the non-Federal sponsor only if the statute under which the funds were provided to the sponsor allows the use of the funds for cost sharing. This policy applies to any intended use of Federal funds by the non-Federal sponsor to either acquire lands, easements, or rights-of-way; or perform construction in advance of a Federal project; or perform or assure performance of relocations; or to satisfy cash contributions to construct a project. This policy also applies to Section 215 (Public Law 90-483, as amended) projects, and project work performed inder provisions of Section 104 and 204(e) of Public law 99-662. The burden is on the sponsor to demonstrate that acceptable authorization exists. The sponsor can meet this burden by providing the Corps with a letter from the Federal agency that administers the statute in question, approving the use of the funds to satisfy the Corps' non-Federal cost sharing requirements. District commanders should also investigate sources of Federal funding that may be connected to providing a local cooperation requirement other than a cash contribution. Sponsors may, for example, request credit for resources (e.g., LERRD) purchased with Federal funds. The same general cost sharing prohibition applies: a sponsor cannot

receive cost sharing credit for such resources unless the Federal granting agency verifies in writing that such credit is expressly authorized by statute. (ER 1165-2-131)

g. Project Cooperation Agreement (PCA) Process. Once a project is authorized for construction, the budget/appropriations process drives the PCA process. Current policy dictates that PCAs will not be executed until: (1) the project document has been approved by HQUSACE; (2) the project is budgeted as a new construction start or construction funds are added by Congress, apportioned by OMB, and their allocation approved by ASA(CW); (3) documentation of compliance with the National Environmental Policy Act (NEPA) and other associated environmental laws and statutes in the PCA checklist has been furnished; and (4) the draft PCA has been reviewed and approved by ASA(CW).

(1) Budgeted New Construction Starts. PCA issues (e.g., items of local cooperation, cost sharing allocation, credit, sponsor coordination and understanding of PCA language requirements, etc.) are to be an integral part of the project document in each stage of report development. During the Reconnaissance Phase, the Project Manager will coordinate with the prospective sponsor, communicating the requirements of study and project cost sharing under WRDA 1986, as amended. During the Feasibility Phase, the full implications of local cooperation requirements are discussed with the sponsor within the context of the current model PCA. The first draft PCA is prepared by the Project Manager in conjunction with the non-Federal sponsor in the latter stages of the Feasibility Phase prior to the feasibility review conference (FRC). Ideally, once the draft PCA has been reviewed as part of the FRC, the PCA would then require only minor changes once the project is authorized and budgeted as a construction new start.

(2) Congressional Adds. After each MSC has coordinated with HQUSACE (CECW-B) on its recommended implementation plan for work added by the Congress, the Project Manager will document what the final project report will be, what it will cover, and the schedule for development of the complete detailed decision document and PCA package through submittal to HQUSACE and ASA(CW). Once agreement is worked out, the Project Manager will follow the same PCA submission procedures as in 10-1.f(3) below.

(3) Execution. Once a project has been funded by Congress as a new construction start, the Project Manager shall begin final negotiations with the local sponsor and submit the draft PCA package (i.e., transmittal letter with draft PCA, financing plan, and current approved project document) to HQUSACE (CECW-A). In the district's transmittal, the Project Manager reaffirms that the draft PCA and financing plan reflect the project as approved by ASA(CW) in the OMB-cleared Chief's Report or subsequent report so approved and cleared. Any changes to the last ASA(CW) cleared report must be fully documented by the Project Manager in the transmittal memorandum. If a Limited Reevaluation Report (LRR) is required due to a time lag in the economic analysis, it should precede any PCA submission. HQUSACE staff will review the PCA package for policy compliance with the basic detailed decision document and prior ASA(CW) instructions, and legal sufficiency. For PCA packages found to be in compliance, CECW-A will prepare the draft DCW transmittal memo to ASA(CW) and forward it to the ASA(CW) for approval to execute. For PCAs with outstanding issues, HQUSACE will return the PCA to the MSC for resolution before the PCA can be approved for execution. Upon resolution, CECW-A will transmit the PCA to ASA(CW) for approval to execute.

(4) Forecast Final Cost Estimate. All Civil Works projects are managed, planned, and executed under the Life Cycle Project Management System (LCPM) (ER 5-1-11). Consistent with ER 5-1-11, the forecast final cost estimate to be entered into PCAs for all specifically authorized new starts (including separable elements, resumptions, and unstarted projects previously funded for construction) will be based on the most current cost estimate prepared in accordance with the Micro-Computer Aided Cost Estimating System (M-CACES) in the Code of Accounts format. The ASA(CW) will not execute any PCA for a new construction start which does not have an M-CACES cost estimate presented in the Code of Accounts format. District and division commanders must ensure that the financing plan and PB-2a accompanying the PCA package that are submitted to HQUSACE, are based upon the appropriate cost estimate as described above. District and division commanders must also ensure that M-CACES cost estimates are completed for projects proposed for authorization (in feasibility reports) and projects for which construction capabilities are expressed in any particular fiscal year. Feasibility reports that recommend a project must include the project's baseline estimate (i.e., fully funded: escalated for inflation through construction) which is the fully-funded M-CACES estimate developed for the recommended scope and schedule. Final approval of the project baseline estimate lies at the division and will become fixed in value at the time the division commander issues the public notice.

(5) Disclosure of Lobbying Activities. Section 319 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990 amends Title 31 of the United States Code by adding Section 1352 entitled, "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions". Section 1352 affects, among other things, Federal contracts, grants, and cooperative agreements, that are entered into after December 23, 1989. All PCAs executed subsequent to December 23, 1989, for all specifically authorized and Continuing Authorities projects, together with all feasibility studies, Section 204 and Section 215 Agreements, and water supply and recreation contracts, will require an accompanying signed Certification Regarding Lobbying, and if applicable, a completed Disclosure Form. These forms must be thoroughly discussed with the non-Federal sponsors prior to submission of the final PCA to HQUSACE, or in the case of Continuing Authorities, prior to final approval of the PCA. Signed certificates and, if necessary, disclosure forms will be attached to the PCA prior to execution by the appropriate Department of the Army official and must be kept on file by the executing office for later submission to HQUSACE, if requested.

h. Credit for Non-Federal Sponsor Indirect Costs. The policy for crediting the costs associated with the non-Federal sponsor's efforts towards implementation of a project is generally established in OMB Circular A-87 and ER 1165-2-131.

(1) Specifically, credit will be allowed for all reasonable, allocable and allowable costs incurred or accrued by the non-Federal sponsor in connection with its responsibilities associated with the project. This includes the actual cost of efforts to acquire lands, easements. rights-of-way and provision of relocations and disposal areas (i.e., LERRD) required for the project, either 5 years prior to or any time after execution of the PCA. These creditable costs include the necessary engineering and design, actual project management costs as well as the actual costs of establishing and maintaining management systems necessary to conduct non-Federal LERRD

responsibilities. Where non-Federal interests actually undertake construction of all or part of the authorized project under a specific statutory authority allowing construction of features of authorized projects, or construction under the provisions of Section 215 of the Flood Control Act of 1968, as amended, and Sections 104 and 204 of WRDA 1986, Section 206 of WRDA 1992 and Section 211 of WRDA 1996, or for hazardous and toxic waste investigations when deemed warranted by the government and the sponsor, the sponsor's reasonable, allocable and allowable costs associated with engineering, design, construction, supervision, administration, inspection and investigation as well as the costs of these functions themselves, would be eligible for credit. The approval of such a request would be formalized in a separate agreement prepared in accordance with the requlations that govern the implementation of such actions. Only those actual associated costs stipulated above are eligible for credit and are to be included in total project costs and costs shared based on project purposes. However, the one exception to this rule is that any costs encountered by the non-Federal sponsor in auditing the Federal records on the project to assure that their funds were properly used are allowed to be included in the total project cost and cost shared.

(2) Costs incurred and/or accrued by the non-Federal sponsor which complement Federal project responsibilities for construction of the project are not creditable. Such costs include but are not limited to: participating in and attending meetings to formally develop and negotiate the PCA; efforts related to developing a financing plan and costs associated with actually obtaining and managing local funds; review of the engineering and design documents related to the construction of the project; a construction inspector specifically appointed or hired by the non-Federal sponsor to oversee construction; and attending meetings to discuss the progress of construction.

(3) While PCAs executed by non-Federal sponsors and the Federal Government urge close cooperation and joint management of a project throughout its design and construction, and indeed the sponsor has the prerogative of conducting such activities in any way they see fit, it is the reponsibility of the Federal Government's Contracting Officer to assure that design and construction of a project takes place in compliance with the plans and specifications and in a timely and efficient manner. This approach is significantly different from the approach taken in crediting the non-Federal sponsor for their efforts in connection with conducting the feasibility study (i.e., all negotiated costs for efforts performed by the non-Federal sponsor up to the issuance of the division commander’s notice, including but not limited to: labor (direct and indirect), overhead, supervision and administration, travel, costs associated with attendance at meetings (both locally and in Washington, if necessary), are included in total project cost and cost shared). This distinction must be made clear to non-Federal sponsors in the earliest stages of PCA negotiation (during feasibility), in order to avoid confusion and erroneous expectations as a project progresses toward construction.

i. Credits for Work-in-Kind Performed by Non-Federal Sponsors. Construction may not be performed by non-Federal sponsors on Civil Works projects except pursuant to Section 215 of the 1968 Flood Control Act, as amended; Section 104 of WRDA 1986, as amended (for flood control); Section 211 of WRDA 1996 (for flood control); Section 204 of WRDA 1986, as amended (for harbor projects); Section 4 of the Flood Control Act of 1944, as amended (for recreation facilities); Public Law 84-826, as amended (for beach erosion control projects); Section 206 of WRDA 1992 (for shoreline protection); or other limited

or project specific authority (e.g., Section 211(e)(2)(B) of WRDA 1996). This prohibition applies not only to construction items, but also to preconstruction engineering and design; engineering and design during construction; and construction management. The approval authority for performance of work-in-kind by non-Federal sponsors is the ASA(CW). Any credit afforded a non-Federal sponsor for approved work-in-kind is limited to the lesser of the following: (1) actual costs that are auditable, allowable, and allocable to the project; or (2) the Government's estimate of the cost of the work; or (3) in the case of certain 104 credits, the estimated reduction in the cost of the remaining project construction. Audit requirements of the following regulations must be followed, as appropriate: ER 1165-2-29; ER 1165-2-120; ER 1165-2-18; ER 1165-2-131; and, ER 1165-2-124. In affording credit to non-Federal sponsors for work-in-kind, price levels shall not be adjusted. This requirement applies whether the work-in-kind is performed prior to, or after, the award of the initial Government construction contract. Not only shall actual costs not be adjusted for price levels, but also any estimated cost or cost reduction that is the basis for a credit shall be computed using the same price levels as those in effect at the time the non-Federal work is performed. Furthermore, any credit approved by the ASA(CW) for Section 104 work performed prior to 17 November 1986 shall not subsequently be adjusted for price levels.

j. Provision of Non-Federal Cash for Construction. Non-Federal sponsor's funds for construction of Civil Works projects and separable elements should be made available and obligated in a timely fashion such that Federal funds are not inappropriately substituted for non-Federal funds. Methods for computing and collecting the non-Federal sponsors' annual cash contributions are provided in ER 1165-2-131 (Appendix B) and Project Management Guidance Letter (PMGL) No. 11 (revised 18 Dec 1992). Appendix B (of ER 1165-2-131) procedures are to be applied to all Civil Works projects and separable elements except where the Government is already bound to do otherwise by contractual agreements with non-Federal sponsors. For Appendix B projects and separable elements, proportional Federal/non-Federal cash funding of fiscal obligations for construction is required. This means that the non-Federal sponsor's funds must be made available and obligated so that, at any point in time, the ratio of cumulative obligations of non-Federal funds to cumulative obligations of all funds is the same as the currently estimated ratio of ultimate obligations of non-Federal funds to ultimate obligations of all funds. The non-Federal sponsor's cash share in a given fiscal year is derived from an estimate for the non-Federal sponsor's overall cash share, and is not affected dollar-for-dollar by changes in the estimated amount of credits for LERRDs in that fiscal year. However, credits afforded for work by a non-Federal public entity at a Federal water resources project authorized under Section 104 (General Credit for Flood Control) of WRDA 1986 (for the flood control project purpose), under Section 215 (Reimbursement for non-Federal Expenditures) of the Flood Control Act of 1968, and under any authorized work-in-kind are applied dollar for dollar against cash requirements. In the event that a non-Federal sponsor fails to make available the funds required, the division commander should immediately notify CECW-B of such failure.

10-2. Real Estate Requirements and Acquisition for Multiple Purpose Reservoir Projects.

a. Requirements. Real estate requirements are governed by the Joint Policies of the Departments of the Interior and Army, which is published in 27 F.R. 1734, 22 February 1962. This policy provides that fee title is acquired to lands needed for the dam site,

construction areas, and permanent structures. Further, for the reservoir itself, land is acquired in fee up to the maximum flowage line (the top of controlled storage, including flood control, plus a reasonable freeboard to safeguard against the adverse effects of saturation, wave action and bank erosion). Where this is insufficient to provide a minimum of 300 feet horizontally from the conservation pool (all planned storage except that which is exclusively for flood control) fee acquisition is increased to that extent. Fee title is also required for separable areas used for recreation (At multiple purpose reservoir projects Federal participation in recreation facilities may extend to separable lands); access to the lake; and land required for fish and wildlife mitigation and enhancement. Easement interests may be acquired in lieu of fee title for areas in the upper reaches of the project above the conservation pool if financially advantageous and not required for fish and wildlife or recreation purposes. Also, easements are generally acceptable for rights-of-way for the relocation of public highways, public utilities, and railroads. Lands downstream from the dam may be acquired in fee or easement for operational purposes. A real estate interest will be obtained in those areas downstream of a spillway where spillway discharge could create or significantly increase a hazardous condition. (ER 1110-2-1451; Chapter 2, ER 405-1-12)

b. Acquisition. Section 103(i) of WRDA 1986 (Public Law 99-662) assigns responsibility for lands, easements, rights-of-way, relocations dredged material disposal areas (LERRD) to non-Federal interests (subject to cost sharing limits). Interpretation of the Act, however, allows for several possibilities as to which partner (Corps or non-Federal sponsor) actually carries out acquisition of the required real estate interests or holds title to those interests. The possibilities range from non-Federal interests performing all aspects of required acquisitions to acceptance of their request that the Federal Government perform all real estate acquisition for the project. Provided the Corps and the sponsor agree, the Corps may acquire the required lands, easements, rights-of-way and dredged material disposal areas on behalf of the sponsor, subject to advance receipt of payment from the sponsor. The authority for Corps acquisition stems from the project authority itself and the Civil Functions Appropriations Act of 1938, approved 19 July 1937 (50 Stat. 515, 518; 33 U.S.C. 701h) which authorizes the Secretary of the Army to receive states and political subdivisions funds to be expended in connection with funds appropriated for authorized flood control projects, whenever the expenditures may be considered as advantageous to the public interest. Acquisition generally starts at the damsite and moves progressively upstream. Required real estate interests for authorized fish and wildlife mitigation shall be acquired before any project construction commences or concurrently with real estate interests for other project functions, whichever ASA(CW) deems appropriate. Project lands may be acquired from landowners by purchase, condemnation or donation. In most cases the sponsor (or the Corps, if the Corps has accepted the effort) should be able to negotiate an agreement satisfactory to the landowners. Prior to closing, title evidence is reviewed, title clearance is completed and an inspection is made of the premises. At closing, a deed to the sponsor (or the United States) is accepted and payment of the purchase price is made to the landowner. If agreement with the owner cannot be reached on a mutually acceptable price or if a title defect cannot be readily resolved, condemnation proceedings will be filed by the sponsor in the appropriate state court (or, if the Corps is acquiring the land, the United States Department of Justice institutes condemnation proceedings in Federal District Court). The landowner will be paid or reimbursed for expenses incurred by the landowner in

conveying his or her property to the sponsor or the United States, such as recording fees, mortgage prepayment penalties, and transfer taxes. Generally, mineral rights will not be acquired unless development thereof would interfere with project purposes. However, mineral rights not acquired will be subordinated to the Federal Government's right to regulate their development in a manner that will not interfere with project purposes. Following project authorization and appropriation of construction funds, public meetings are conducted in the vicinity of the project to discuss the project, the acquisition program and acquisition schedule, and to afford landowners an opportunity to comment. (Chapters 2 and 5, ER 405-1-12)

c. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646), as amended. This legislation provides for uniform and equitable treatment of all persons displaced from their homes, farms, and businesses as a result of land acquisition for Federal and Federally-assisted projects. The Act authorizes reimbursement for actual moving expenses and losses of personal property resulting from moving for a person displaced from his or her residence by such a project. In lieu of actual expenses, such person may elect a fixed payment for a dislocation allowance according to a schedule established by the Department of Transportation. Actual reestablishment expenses not to exceed $10,000 may be recovered by a displaced small business, farm, or non-profit organization. Likewise, business or farm operations may be reimbursed for actual expenses of moving and losses to personal property, or they may be eligible to choose a fixed payment in lieu of a payment for actual moving or related expenses. Such fixed payment shall equal the average annual net earnings of the operation, as computed in accordance with the implementing regulations, which shall be not less than $1,000 nor more than $20,000. A replacement housing payment is also provided to enable the displaced person to be relocated in a comparable replacement dwelling. This payment (up to $5,250 for tenants and $22,500 for homeowners) is in addition to the purchase price paid for the property acquired for the Federal project. These costs are not included in the project benefit-cost ratio, but they are allocated to reimbursable purposes. (ER 1165-2-117; Chapter 6, ER 405-1-12)

d. Special Federal Authorities and Policies Pertinent to LERRD Responsibilities.

(1) Relocation of Public Highways, Public Utilities, Railroads and Pipelines. Lands necessary for a project are acquired subject to outstanding easements for public highways, public utilities, railroads and pipelines. However, when there will be a taking of these easements, the owner must be compensated. Federal courts have held that when the Federal Government acquires public highways and public utilities, the measure of compensation may be the cost of providing substitute facilities where necessary. Conversely, where there is no further necessity for such a facility, the Federal Government is only required to pay nominal consideration for the right-of-way. When privately-owned roads, pipelines and railroads, are required it may be in the best interest of the Federal Government to provide for relocating them since relocation may be the least costly alternative. A relocated facility should serve the owner in the same manner and reasonably as well as does the existing facility. However, substitute roads can be constructed to the standards which the state or municipality would use in constructing a new road taking into consideration geography and projected traffic not including project induced traffic. In project planning, Corps determination of needed relocations will be based on the foregoing, and related sponsor costs

for their accomplishment will count toward the value of project LERRD. At request of the state or political subdivision, a substitute road may also be constructed to even higher standards than as provided above if the state or political subdivision pays the added cost prior to initiation of construction. (ER 1165-2-117; Appendix Q, EFARS)

(2) Relocation of Cemeteries. The relocation and/or protection of cemeteries is premised on acquisition of a real estate interest and extinguishment of the legal right of the next-of-kin to visit and preserve the burial grounds of their ancestors and relatives. It is the policy of the Corps of Engineers to respect the wishes of the next-of-kin as to the removal and reinterment of bodies. Ordinarily, just compensation for the acquisition of an existing cemetery site will consist of furnishing a new site comparable to the old site, plus disinterment and reinterment of the bodies, and transferring monuments and other facilities from the old to the new site. All costs would be considered part of the LERRD responsibility. Should the cemetery be protected in place, by construction of a levee or similar structure, and access preserved, costs would be considered part of project construction, and cost shared accordingly. (Appendix Q, EFARS)

(3) Reestablishment of Towns. In certain cases, Congress has authorized relocation of specific communities. However, there is no general authority vested in the Secretary of the Army (by way of Federal legislation or Federal court decisions) to pay the cost of physically relocating a town. Recognizing that project requirements dictate the acquisition of private property within the project, the Federal Government can participate in financing the cost of comparable streets and utilities in a new town in the event the governing body of the town and its citizens decide that a new town will, in fact, be established. If no new town is to be established, the Federal Government has no legal authority to pay other than a nominal consideration for the streets and utility systems in the old town since no substitute facilities would be necessary. Traditionally, community relocation issues were treated following project authorization. However, the new policy is to address these issues during preauthorization planning. This will assure the community that the Corps is aware of their concerns and will outline the respective roles of the Corps, the project sponsor, and community in the authorizing documents. (Appendix Q, EFARS)

10-3. Real Estate Requirements for Single-Purpose Flood Control Reservoir and Non-Reservoir Projects.

a. Requirements. No construction contract is awarded until a valid right of possession has been obtained to the entire project area, or for a usable segment thereof. The minimum interests in real estate which the non-Federal sponsor must obtain are given below. In addition to these estates in lands, appropriate real estate interest must be acquired by the sponsor in any area where project operations will effect a taking within the meaning of the Fifth Amendment of the U.S. Constitution. (Chapters 2 & 12, ER 405-1-12)

(1) Flood Control and Shore Protection Projects. Fee title, or permanent easements, for levees, walls, other permanent structures, channel rectification works, and adequate access thereto. Permanent easements for lands in reservoir areas of flood control only projects which do not provide conservation pools, spoil disposal and borrow areas required for future maintenance work, and adequate access thereto. Permit, or temporary easements, for spoil, work and borrow areas required during construction, and adequate access thereto.

(2) River and Habor Projects. Fee title for lock site and for all other permanent structures. Permanent easements for right-of-way for the waterway improvements. Permanent easements in lands required for the erection and maintenance of aids to navigation. (For improvements which are part of the Inland Waterway System, real estate requirements are similar, but the responsibility therefore is entirely Federal.)

(3) Separable Recreation Lands. Federal participation in recreation facilities at non-reservoir projects and dry dams must be within the project lands (required for purposes other than recreation) for which fee title is available. Fee title is also required for any separable recreation lands needed for access, parking health and safety.

b. Relocations Assistance. The provisions of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, as amended, described in paragraph 10-2c, are applicable to acquisitions for all types of Federal projects. Whether acquisitions are actually accomplished by the Corps (see below) or the project sponsor, the provisions of the Act must be followed and the related costs counted as part of project LERRD costs.

c. Condemnation on Behalf of Local Interests. Under the provisions of Acts of Congress approved 29 June 1906 (33 U.S.C. 592), 8 August 1917 (33 U.S.C. 593), 18 July 1918 (33 U.S.C. 594) and 18 August 1941 (33 U.S.C. 701c-2), the Secretary of the Army may cause proceedings to be instituted, in the name of the United States, for acquisition by condemnation of real estate interests which non-Federal entities undertake to furnish free of cost to the United States. The Chief of Engineers may request such action on behalf of the non-Federal sponsor if the non-Federal sponsor lacks condemnation authority or cannot meet the construction schedule, or if the measure of just compensation is different under local law and Federal law. (Chapter 12, ER 405-1-12)

d. Special Federal Authorities and Policies Pertinent to LERRD Responsibilities.

(1) Evacuation in Lieu of Levees. Section 3 of the 1938 Flood Control Act, dated 28 June 1938 (Public Law 761, 75th Congress), authorizes the Chief of Engineers to substitute evacuation in lieu of authorized levees or floodwalls for a portion or all of the areas proposed to be protected. A sum not exceeding the amount saved in construction costs may be expended for evacuation of the locality eliminated from protection, including rehabilitation of the persons evacuated. Where this authority might be used, the evacuation effort substituting for levee construction would be treated as a nonstructural element of the project, and cost shared accordingly. (See paragraph 13-10.b.)

(2) Other. The special authorities and policies cited in paragraph 10-2.d for multiple purpose reservoirs are also applicable to other Corps projects to such extent as there may be analogous situations and possibilities.

10-4. Relocations. The term "relocation", with the exceptions noted below, means providing a functionally equivalent facility to the owner of an exisiting utility, cemetery, highway, railroad, or other public facility when such action is authorized in accordance with applicable legal principles of just compensation. A "relocation" is also providing a functionally equivalent facility when such action is

specifically provided for, and is identified as a relocation, in the authorizing legislation for a navigation project or any report referenced in the authorizing legislation. Providing a functionally equivalent facility may take the form of alteration, lowering, raising, or replacement and attendant removal of the affected facility or part thereof. The non-Federal sponsor is required to perform or assure the performance of the relocation. For a relocation other than a utility relocation, the value of the relocation is creditable against the non-Federal sponsor's required additional 10 percent payment under Section 101(a)(2) of WRDA 1986, as amended. For a utility relocation, the non-Federal sponsor's actual costs in performing or assuring the performance of the utility relocation are creditable against the non-Federal sponsor's required additional 10 percent repayment under Section 101(a)(2) of WRDA 1986, as amended. In practice, under the terms of the PCA, the cost of the relocation will be the basis for computing non-Federal sponsor credit for all relocations.

a. Flood Control Projects. (Generally applicable also to projects for other purposes, except navigation.)

(1) Highway Bridges. Alteration of highway bridges necessitated by a flood control project (channel realignments, widening, etc.) is considered part of the sponsor's LERRD responsibility. However, alterations to provide for the continued structural integrity of highway bridge foundations, piers, or abutments that are to remain in place should be included as part of basic project construction (e.g., when channel deepening would extend below existing bridge piers and consequential reinforcement, under-pinning or other reconstruction of the piers are the only alterations required), and cost shared accordingly.

(2) Railroad Bridges.

(a) Alterations/Relocations. Alterations or modifications to existing railroad bridges necessitated by changes in the configuration of the channel at the existing crossing will be considered part of the project construction cost and cost shared accordingly. As needed, this may include alteration of foundations for a bridge that will remain in place, relocation of the existing superstructure to new foundations, complete reconstruction of the bridge, temporary detours, and approaches thereto, including trackage that must be altered/modified to suit. Alterations or relocations of other trackage or railroad facilities required for the project, but not related to a railroad bridge change, are to be performed or arranged for by the project sponsor as part of the sponsor's LERRD responsibility.

(b) New Railroad Bridges. The cost of new railroad bridges required because of project construction in fast land or new channel alignments (i.e., where there is no counterpart existing crossing) will be designated in the authorizing document as part of project construction costs, and cost shared accordingly. However, if not authorized by Congress, a new bridge and its approaches on fast land are considered a part of the relocation of the track that crossed the fast land, and such costs are categorized as a LERRD item.

(3) Utilities. Utility relocations required for a project are to be performed at 100 percent non-Federal expense, as part of the sponsor's LERRD responsibility. However, construction of the segments of relocated utilities that pass under or through the line of protection to be provided by the project may be incorporated in Corps

plans for construction of the structures in the line of protection, subject to sponsor contributions equal to the related contract costs.

(4) Removals. The cost of removal of facilities (i.e., those not being relocated from lands needed for the project development) are considered to be part of project construction costs, and cost shared accordingly. However, the cost of acquiring such facilities, so that they may be removed, is part of the sponsor's LERRD responsibility.

b. River and Harbor Projects.

(1) Highway and Railroad Bridges. Bridge alteration costs are project construction costs to be assigned partially to the bridge owner and partially to the navigation project, using the procedures of the Truman-Hobbs Act (as described in ER 1165-2-25). The portion of bridge alteration costs so assigned to the navigation project are considered to be part of the general navigation features (GNF), and are cost shared accordingly. In the case of new bridges, required because of construction of new navigation channels that would otherwise intercept existing highway or railroad routes, all costs are considered to be part of GNF.

(2) Relocations and the Navigation Servitude. A relocation must occur when a facility or part of a facility must be altered, lowered, raised, or removed to allow for the construction of a navigation project and the owner of the facility is entitled to a substitute facility due to just compensation principles. Just compensation principles generally require a substitute facility when the facility's owner has a real property interest in the land on which the facility is located, there is a public necessity for the service provided by the facility and market value has been too difficult to find, or the application of market value would result in injustice to the owner or public. This definition focuses on the issue of just compensation as between the facility owner and Federal Government and takes into account rights the Federal Government has within the navigation servitude. Therefore, the owner of a facility within the navigation servitude has no compensable real property interest with regard to the Federal Government for the portion of the structure within the navigation servitude and the owner of the facility within the servitude is not entitled to a substitute facility when compelled to remove the facility because it is an obstruction to the Federal navigation project.

(3) Deep-Draft Utility Relocations. "Deep draft utility relocations" are handled differently and are only applicable to projects authorized at a depth of greater than 45 feet and applicable only to utilities located within the navigation servitude. A deep draft utility relocation is defined as providing a functionally equivalent facility to the owner of an existing utility serving the general public when such action is not a "relocation" as defined in paragraph 10-4. In accordance with Section 101(a)(4) of WRDA 1986, as amended, one-half of the cost of the deep draft utility relocation shall be borne by the utility owner and one-half shall be borne by the non-Federal sponsor. Actual costs of deep draft utility relocations borne by the non-Federal sponsor up to 50 percent of the total cost of the utility relocation will be creditable against the non-Federal sponsor's additional 10 percent share. The Corps might compel deep draft utility relocations if confronted with reluctant utility owners. However, such involuntary deep draft utility relocations would be for the purpose of facilitating project construction and would not serve to change the statutory requirement for 50/50 cost sharing between the non-Federal sponsor and the utility owner. Therefore, in those cases

where the utility owners are compelled to relocate under permit conditions, the non-Federal sponsor is responsible for one-half of the cost of these deep draft utility relocations. Administrative and any legal costs incurred by the Corps to compel deep draft utility relocations would be shared 50/50 between the non-Federal sponsor and the utility owner.

(4) Removals. The cost of removal of facilities (i.e., those not being relocated) which are located on fastlands are considered to be part of GNF costs, to be cost shared accordingly. However, the cost of acquiring such facilities, so that they may be removed, is part of the sponsor's LERRD responsibility. Where there is an obstruction to a navigation project that is within the navigation servitude, and that obstruction does not fit within the definition of a relocation as discussed in paragraph 10-4 or a deep draft utility relocation as presented in paragraph 10-4.b.(3), the obstruction will be removed at owner cost to accommodate the navigation project. If facilities exist which are partially located on fastland and partially subject to the navigation servitude, a reasonable allocation of costs will be made between owner costs and relocation or GNF costs as appropriate.

(5) Removal Responsibility. Where the non-Federal sponsor has the capability to compel the owner of a facility obstructing a navigation project to remove the facility solely at owner cost, the non-Federal sponsor will exercise this capability. The capability of the non-Federal sponsor to successfully compel the removal of facilities at owner cost will be jointly assessed by the Corps and the non-Federal sponsor. Factors in this assessment will include the legal authorities available to the non-Federal sponsor and their strength, the applicability of the non-Federal sponsor's authorities to the Federal navigation project and the record of success in exercising the non-Federal sponsor's authorities. The non-Federal sponsor may also elect to directly negotiate with the owner of a facility obstructing a navigation project for the removal of the facility in lieu of exercising any non-Federal sponsor or Corps authorities to compel the facility removal at owner cost. However, any payments or reimbursements by the non-Federal sponsor to the facility owner for the removal of the facility would not be creditable against the non-Federal sponsor's required additional 10 percent repayment under Section 101(a)(2) of WRDA 1986, as amended. In the event it is determined that the non-Federal sponsor does not have the capability to compel the owner of a facility obstructing a navigation project to remove the facility at owner cost and the non-Federal sponsor does not elect to directly negotiate with the facility owner for the removal of the facility, the Corps will exercise its rights under the navigation servitude and any applicable Corps permit conditions to require the owner to perform the removal of the facility at the owner’s expense.

(6) Accounting for Removal Costs. When a facility is removed at owner cost, the facility removal cost and any cost to replace the facility at a new location (for example at a greater depth) will be an owner cost. The administrative and legal cost to the non-Federal sponsor or the Corps of requiring the owner to remove the obstruction will be considered GNF costs and shared accordingly. Corps regulatory program funds will not be used for accomplishing removals or permitting owner replacements of removed facilities. Costs to the owner of a facility for its removal and any owner replacement costs, including any costs voluntarily paid or reimbursed by the non-Federal sponsor, will be accounted for as associated costs of the project and are not shared GNF costs nor non-Federal sponsor costs for lands,

easements, rights-of-way or relocations. Owner removal and replacement costs are economic costs of the project that must be reflected in the calculation of net national economic development benefits. Where necessary, the Corps may also have the option to remove the obstruction itself. The costs to the Corps of removing the obstruction will be considered costs of the GNFs of the project and shared accordingly. In the event a court determines that the owner of a facility within the navigation servitude is entitled to payment of just compensation as a result of a removal action, that compensation amount will be considered a cost for lands, easements, and rights-of-way, which the non-Federal sponsor will be required to pay in accordance with Section 101(a)(3) of WRDA 1986, as amended. If the court also determines the appropriate measure of just compensation is provision of, or payment based on, a substitute facility, this will be considered a relocation, which the non-Federal sponsor will be required to provide in accordance with Section 101(a)(3) of WRDA 1986, as amended.

10-5. Water Quality Requirements. State water quality certification or a waiver thereof is required by the Clean Water Act of 1977 prior to discharge of dredged or fill material into waters of the United States. (See paragraph 3-5)

10-6. Accomplishment of Construction Work.

a. Use of Contractors. It is Corps policy to accomplish Federal civil works improvement by contract with private construction firms through competitive bidding to the greatest extent possible. Contracts are advertised and administered in accordance with the Federal Acquisition Regulation (FAR) and as further defined in the Department of Defense Supplement (DFARS), Army Supplement (AFARS) and Engineer Supplement (EFARS).

b. Construction Management Support Services. Contracting with private firms to perform construction management services is appropriate under certain circumstances, such as, when adequate numbers of Corps personnel are not available or when specific technical expertise must be obtained. Surveying and materials testing services are examples of supportiveness which lend themselves to contracting out. The management functions of all Civil Works field offices is to be retained as an internal function and not delegated to private contractors. See ER 415-2-100 for detailed guidance on staffing of Civil Works projects.

c. Use of Government Plant and Hired Labor. Work is accomplished with Government owned plant and hired labor when it is of a type in which contractors are not interested; where advertisement of the work resulted in procurement of unacceptable bids and suitable government plant existed and was utilized as the basis of the Government estimate; or when it requires special equipment or qualifications for doing the work which are not generally available to the contracting industry. Bank revetment work with special Government-owned plant is an example of the latter case. Public Law 95-269 provides that the Secretary of the Army, acting through the Chief of Engineers, carry out projects for river and harbor improvements by contract or otherwise in the manner most economical and advantageous to the United States. The Act provides for carrying out dredging and related work by contract when this work can be accomplished at reasonable prices and in a timely manner. In this regard, Public Law 95-269 provides that dredging or related works of river and harbor improvement shall be done by contract if: (1) the contract price is less than 125 percent of the cost of doing the work

by government plant; or (2) in any other circumstance, if the contract price is less than 125 percent of a fair and reasonable estimated cost of a well-equipped contractor doing the work. Public Law 95-269 further provides for the reduction of the existing fleet of Federally-owned dredges to a fully operational minimum fleet of technologically modern, efficient dredges to meet emergency and national defense requirements. The Act also provides that the Secretary of the Army shall maintain a sufficient number of Federally-owned dredges to insure the capability of the Federal Government and private industry together to carry out projects for improvements of rivers and harbors. (ER 1110-2-1302, ER 1130-2-520, EFARS)

d. Contracting with Small and Small Disadvantaged Business. Contracting with small business concerns is governed by the provisions of the FAR. (FAR, 19.0)

e. Buy American Act. Part 25 of the FAR and supplements govern the implementation of the Buy American Act (41 U.S.C. 10a-d) and its application to civil works construction contracts. New rules have made Trade Agreement Acts such as the North American Fair Trade Act (NAFTA) applicable to the Corps of Engineers. These recent changes are reflected in FAR Part 25.407(d).

f. Construction Quality Management. Part 46 of the FAR and supplements require the use of a Quality Management System consisting of Contractor Quality Control (CQC) and Government Quality Assurance (QA) for fixed price construction contracts where the contract amount is expected to exceed the small purchase limitation. CQC is the contractor's inspection system used to ensure that work performed under the contract is performed in conformance with contract requirements. QA is the system through which the government assures that the CQC system is working and that the contract quality requirements are fulfilled. (ER 1180-1-6)

10-7. Reservoir Clearing. The general objective in clearing reservoir areas is to hold such clearings to a minimum compatible with project purposes in order to effect an over-all reduction in construction costs. All areas which are potential hazards in achieving primary project purposes should be cleared in accordance with established guidelines. Clearing and disposal of cleared material must comply with all local and state laws applicable in the area where the project is located.

10-8. Use of Dredged Material. It is Corps policy to secure the maximum practicable benefits through the use of material dredged from navigation channels and harbors, provided such use is in the public interest. Such use of suitable non-contaminated dredged materials can include creation of wetlands, nourishment of beaches, erosion control of river banks, and land reclamation. In accordance with Section 150 of Public Law 94-587 up to $400,000 may be expended by the United States to create a wetland area from dredged material (paragraph 20-5). However, since this authority does not require cost sharing, it will not be used. Section 145 of Public Law 94-587, as amended, authorizes the placement of sand obtained from dredging operations onto adjacent beaches if requested by states, if deemed to be in the public interest, and if increased disposal costs are provided 100 percent by the state, or are shared (50-50) when certain criteria are met (paragraph 12-22). Section 204 of WRDA 1992, as amended, authorizes the Secretary of the Army to carry out projects for the protection, restoration, and creation of aquatic and ecologically related habitats, including wetlands. Project implementation is conditioned on non-Federal interests entering into a cooperative

agreement to provide 25 percent of the cost associated with project construction and agreeing to pay 100 percent of operation, maintenance, repair, replacement, and rehabilitation costs. Utilization of dredged material for other uses may also be undertaken provided extra cost to the United States is not incurred. However, under Section 207 of WRDA 1996, the Secretary of the Army may select (and cost share incremental costs in accordance with Section 204(c) of WRDA 1996), with the consent of the non-Federal interest, a disposal method that is not the least-cost option if the Secretary determines that the incremental costs of such disposal method are reasonable in relation to the environmental benefits. If it is evident during the initial planning of dredged operations that additional costs would be incurred, non-Federal interests will be given reasonable opportunity to finance the additional costs. Prior to enactment of WRDA 1996, non-Federal interests normally provided without cost to the United States all suitable areas for initial and subsequent disposal of dredged material, including all necessary retaining dikes, bulkheads, and embankments therefor. However, under Section 201 of WRDA 1996, dredged material disposal areas are part of a navigation project's GNFs and are no longer required to be provided by non-Federal interests. Also see paragraph 12-21 discussion of land enhancement from placement of dredged material and restriction on Ocean Dumping. The right to remove material deposited in a disposal area was not included in many older Corps dredged material disposal easements. Where the Government does not own fee title to a disposal area or has not included the right to remove in its existing easement, the removal of previously deposited material may require the acquisition of an additional interest, or credit for such interest in the case of a sponsor-owned facility. (ER 1130-2-520)

10-9. Housing of Project Personnel. It is Corps policy that government housing for permanent duty stations at Civil Works projects not be provided. Such government housing is not constructed or acquired unless justified and approved by HQUSACE on an exception basis. Employees are not required to occupy government quarters as a condition of employment unless specifically determined necessary and approval obtained.

10-10. Special Statutory Authority for Relocations and Alterations. Section 111 of the River and Harbor Act of 1958, as amended, provides authority for replacing, relocating, or reconstructing any structure or facility owned by an agency of government and utilized in the performance of a government function when threatened or adversely affected by construction of a project. This authority does not modify any existing requirement of local cooperation.

10-11. Disposal of Land at non-Local Cooperation Projects Stopped During Construction. Prior to recommending deauthorization of projects stopped during construction it is the policy of the Corps to conduct a study of the status of land acquisition of the project and recommend an appropriate method of land disposal. Recommendations may include, among other things, that: tracts be acquired because of hardships, desires of others, or other compelling reasons; tracts still in open condemnation be revested to former owners; authority be obtained for revestment of tracts to former owners; relocations of highways, railroads, and utilities be concluded; or lands be retained in public ownership. Disposal other than in accordance with the Federal Property and Administrative Services Act of 1949 will be dependent on special legislation providing therefor. (See paragraph 11-10.)

10-12. Transfer of Completed Local Cooperation Projects to non-Federal Interests. Under the terms of the PCA, when the Government determines that an entire project, or functional portion thereof, is complete, the Government provides written notice to the non-Federal sponsor of such determination and furnishes an Operations, Maintenance, Repair, Replacement, and Rehabilitation (OMRR&R) Manual to the non-Federal sponsor. The non-Federal sponsor is then responsible for the OMRR&R of the project, or functional portion. After completion and notice to the non-Federal sponsor, authority is considered to expire for expenditure of Federal funds for construction of additional improvements on the project or for maintenance thereof.

10-13. Project Cost Increase Limitations. Section 902 of WRDA 1986, as amended by Section 3.b of Public Law 100-676, provides that, excluding the impacts of general price increases and any project additions otherwise authorized, the total project costs for any project authorized in WRDA 1986 and all subsequently authorized projects may not exceed the authorization limit by more than 20 percent. Procedures for calculating this limit are described in Appendix P of ER 1105-2-100. A construction contract can not be awarded if the estimated total project costs after bid opening exceed the Section 902 limit (unless and until the limit is modified by law). Also, no reimbursement can be made to a non-Federal sponsor if subsequent to contract award, total project costs exceed the Section 902 limit (unless the limit is modified).

10-14. Appraisal of Lands Containing Hazardous,Toxic, and Radioactive Wastes (HTRW) on Local Cooperation Projects. Regardless of whether or not the land required for a local cooperation project is in the non-Federal sponsor's possession, or whether or not HTRWs exist on or beneath the property, ER 1165-2-131 (paragraph 12.c) is the basic guidance for appraising land values for credit. The credit amount shall be based on an approved appraisal using the principles outlined in the Uniform Appraisal Standards for Federal Land Acquisitions under the assumption that the lands are clean. Therefore, regardless of whether the non-Federal sponsor paid a nominal price or an exhorbitant price and whether the lands are actually clean or contain HTRW, the credit appraisal should assume clean lands. The cost of HTRW cleanup is not a factor in the appraisal (or credit) nor are any cleanup costs to be included in the fair market value of the land or in the estimate of total project cost.